



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 453 OF 2018

MARTIN THIONG’O NYAMWATHI.....APPLICANT

VERSUS

THE DIVISIONAL CRIMINAL INVESTIGATION OFFICER KABETE...1ST RESPONDENT

THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 30th July 2018 and filed on 8th August 2018 seeking to have the matter certified urgent, release of the applicant’s motor vehicle registration No. KAK 486Y currently detained by the 1st respondent at Kabete Police Station and costs of the application thereof. Application is predicated upon grounds set out on the face of the application and affidavit in support deposed by the applicant in person on 1st August 2018.

2. According to the applicant, sometime in April 2018, he was at Githurai parking lot when he was hired by a customer to ferry some luggage for him from Ruaka using his motor vehicle Mitsubishi L 200 pickup Registration No. KAK 486Y. While In company of the customer, he proceeded to Ruaka and picked the luggage which was packed in boxes and delivered the same somewhere in Kahawa West estate.

3. That on 2nd July 2018, while at his routine place of work within Githurai, he was picked by police officers who arrested and questioned him over the same luggage and demanded to be taken where he had delivered the same. Upon visiting the house where he had delivered the goods, they found the house locked and without any occupant inside. Consequently, he was arrested and later released after one day and his motor vehicle detained to date. That despite giving the police the telephone number of the person who hired him and even having taken them to the home where he delivered the luggage no action has been taken in apprehending the culprit.

4. He therefore pleaded for the release of his motor vehicle as he was innocent and that the said motor vehicle is his sole source of income. He indicated his willingness to cooperate with the police and even avail the motor vehicle whenever required.

5. In reply, the respondent filed a replying affidavit sworn on 13th August 2018 and filed same day in which Corporal Julius Oguma confirmed detaining the motor vehicle as alleged claiming that investigations were going on and that the applicant had failed to cooperate by availing the person who hired him in transporting stolen wheel chairs belonging to the association of physically disabled Kenya.

6. During the hearing, both counsels basically reiterated the averments contained in their respective affidavits in support and reply thereof. Mr. Mochere for the applicant submitted that the police have failed to exercise due diligence in apprehending the real culprit for over one month now and that the applicant cannot be punished by having his motor vehicle held as abait and detained indefinitely. M/s Nyauncho for the respondent pleaded with the court to allow police about two weeks to complete investigations for the sake of justice.

7. I have considered the application herein seeking release of motor vehicle registration No. KAK 486Y belonging to the applicant which is said to have ferried stolen wheelchairs belonging to the Association of Disabled Persons Kenya. Both parties are in agreement that the applicant was hired by somebody who is at large to transport some luggage from Ruaka to some point in Kahawa West. According to the applicant, he did not know that the goods he was hired to transport were stolen. He has even taken police to the house where he delivered the goods. He has also given the police the telephone No. to the person who hired him and even identified his house to the officers.

8. The applicant has demonstrated how cooperative he has been as depicted from facts contained in his affidavit which have not been controverted or denied by the respondent. The allegation by the respondent that the applicant has failed to cooperate is not supported by any cogent reasoning or evidence. If the applicant has shown the police the house where he delivered goods, the suspect's home and even given his telephone No. what more cooperation is required of him? To allege that the applicant has refused to record a statement is not convincing. This is somebody who has been in their custody for a whole day having been detained and thereafter released and is willing to avail himself any time he is required.

9. It is now over one month since 2nd July 2018 and the police have not exhibited any effort made so far in apprehending the culprit. The applicant cannot be forced to avail the culprit who was a onetime customer in business and not an acquaintance. He has no machinery to do so. To the contrary, it is the police to execute their mandate and have the culprit arrested. For how long are they going to detain the motor vehicle as a bait pending attendance of the suspect who is at large?

10. The right to own property and its protection thereof is sacrosanct and a constitutional imperative under Article 40 of the Constitution. The applicant has lost income for over one month and should not continue incurring losses in his transport business indefinitely. It is only fair that the motor vehicle be released to him to continue using it to earn his livelihood pending further investigations. In all fairness, it suffices to say that the motor vehicle should be photographed by the police as part of the evidence and the log book deposited with the DCI Kabete as security pending completion of investigations.

11. Accordingly, application dated 30th July 2018 be and is hereby allowed with orders as follows:

(a) That the DCI Kabete is hereby directed to release motor vehicle registration No. KAK 486Y to the applicant immediately upon receipt of this order.

(b) That the Investigating Officer and or the DCI Kabete shall take necessary photographs of the motor vehicle to serve as evidence in future in case of criminal proceedings.

(c) That the applicant shall deposit the log book of the motor vehicle with the DCI Kabete until investigations are complete.

(d) That there shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF AUGUST 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S Kihara holding brief for Nyauncho.....Counsel for the respondent

No appearance For the applicant

Edwin Court Assistant